

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

STEVEN AGRESTA,

Plaintiff,

vs.

Case No. 2004-1971-NH

DR. MURRAY YOFFEE, D.D.S.,
DENTAL ASSOCIATES, P.C., a
Michigan corporation, and REDWOOD
DENTAL GROUP, a Michigan assumed
business name, jointly and severally,

Defendants.

OPINION AND ORDER
OF THE COURT

Plaintiff has filed a motion to preclude defendant's expert witness from testifying.

Plaintiff filed this medical malpractice complaint on May 10, 2004. Plaintiff alleges that, on June 12, 2002, defendant Yoffee extracted his wisdom tooth. Plaintiff claims that he was provided with insufficient information concerning the risks of extraction, and therefore was unable to give informed consent to the procedure. Plaintiff also claims that defendant Yoffee failed to carry out the standard practice of his profession in performing the extraction. Plaintiff avers that defendant Yoffee's malpractice has caused him to experience a condition known as temporomandibular joint dysfunction ("TMJ"). As a result, plaintiff claims that he suffers from "jaw pain,



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locking, . . . clicking[,] . . . headaches and other conditions as well." Plaintiff therefore seeks damages for his injuries, medical treatment, and pain and suffering.

A trial court's decision as to whether a witness is qualified to render an expert opinion, as well as the actual admissibility of the expert's testimony, is reviewed for abuse of discretion. *Tate v Detroit Receiving Hospital*, 249 Mich App 212, 215; 642 NW2d 346 (2002). The court abuses its discretion only if an unprejudiced person, considering the facts before the court, would find no justification or excuse for the ruling made. *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254; 701 NW2d 144 (2005).

In support of his motion, plaintiff alleges that defendant's expert, Dr. Gary Jeffers, did not spend the majority of his professional time in the year prior to the alleged malpractice "as either a general practitioner or teaching general dentistry." As such, defendant argues that Dr. Jeffers is not qualified to offer testimony pertaining to the appropriate standard of care for a general dentist. Defendant also argues that Dr. Jeffers' opinions regarding causation are speculative. Finally, plaintiff urges that defendant's pleadings must be stricken and judgment entered in favor of plaintiff since Dr. Jeffers does not qualify as an expert.

An expert witness is qualified to testify in a case involving a general practitioner if, "during the year immediately preceding the date of the occurrence . . . [the expert] devoted a majority of his or her professional time to *either*. . . [a]ctive clinical practice as a general practitioner" or "[i]nstruction of students in an accredited health professional school or accredited residency or clinical research program in the same health

profession in which the party against whom or on whose behalf the testimony is offered is licensed." MCL 600.2169(1)(c) (emphasis added). There is no requirement that an expert witness be an instructor in general dentistry. See *id.*

In the case at bar, Dr. Jeffers testified that he spends four of his five work days instructing students at the University of Detroit Mercy School of Dentistry. See Defendant's Exhibit D, Deposition of Gary E. Jeffers, D.M.D., M.S. at 15. Dr. Jeffers acknowledged that he teaches courses related to oral surgery rather than general dentistry. *Id.* However, contrary to plaintiff's contention, Dr. Jeffers' focus on oral surgery is inapposite. There is no question that defendant Yoffee is a general dentist, and is licensed as such. Further, there is no question that Dr. Jeffers teaches at an accredited school of dentistry. As such, it is clear that Dr. Jeffers instructs students "in the same health profession in which . . . [defendant] is licensed."

Plaintiff relies on *Decker v Flood*, 248 Mich App 75, 630 NW2d 163 (2001), for the proposition that "a dentist who has so limited his or her practice [to oral surgery] is not a general practitioner" within the meaning of MCL 600.2169. While *Decker* clearly applies to experts engaged in an "[a]ctive clinical practice as a general practitioner" under subsection MCL 600.2169(1)(c)(i), *Decker* is inapplicable to experts qualifying under MCL 600.2169(1)(c)(ii). As noted above, experts under MCL 600.2169(1)(c)(ii) must have devoted the majority of their professional time, in the year prior to an underlying incident, to instruction in the "same health profession" as the party on whose behalf they are testifying. Since defendant's expert witness has devoted a majority of his professional time to instruction of students in an accredited school of dentistry, the

same health profession in which defendant is employed, MCL 600.2169(1)(c)(ii) controls the admissibility of his testimony. Therefore, plaintiff's reliance on *Decker* is misplaced.

The Court now turns to Dr. Jeffers' qualifications to testify concerning causation. In a medical malpractice action, *plaintiff* has the burden of establishing proximate causation between the alleged breach and the injury. *Wiley v Henry Ford Cottage Hospital*, 257 Mich App 488, 492; 668 NW2d 402 (2003) (citation omitted). However, "a plaintiff cannot satisfy this burden by showing only that the defendant may have caused his injuries," and there must be "more than a mere possibility or a plausible explanation." *Craig ex rel Craig v Oakwood Hospital*, 471 Mich 67, 87; 684 NW2d 296 (2004) (emphasis removed). A plaintiff's expert witness should be precluded from testifying as to causation if the expert's opinions are too speculative to assist the trier of fact. *Id.* at 84 (citation omitted).

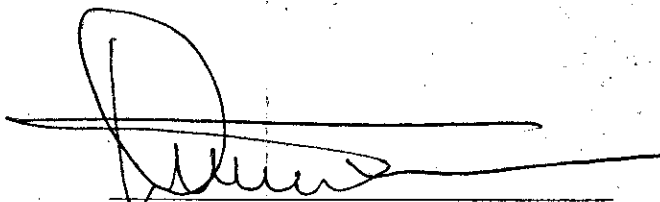
Dr. Jeffers' acknowledgement that he has no opinion as to the cause of plaintiff's TMJ does not undermine Dr. Jeffers' opinion that the procedure performed by defendant was not the cause of plaintiff's injuries. See Jeffers' Affidavit, *supra* at 52. While Dr. Jeffers' does not speculate concerning the actual cause of plaintiff injuries, the defendant in a medical malpractice action does not have the burden of establishing causation. See *Wiley, supra*. As such, plaintiff's request that this Court preclude Dr. Jeffers from testifying concerning causation must be denied.

Having determined that Dr. Jeffers' is qualified as an expert witness in this case, plaintiff's request that defendants' pleadings be stricken for failure to file an appropriate affidavit of meritorious defense must be denied. As such, summary disposition in favor

of plaintiff is inappropriate. Since summary disposition is properly denied, it is unnecessary to address defendant's allegation that plaintiff failed to provide defendant with appropriate notice of his motion for summary disposition pursuant to MCR 2.116(G)(1)(a)(i).

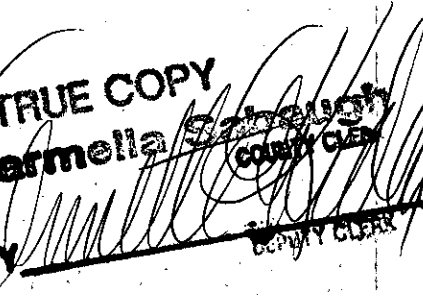
For the reasons set forth above, plaintiff's motion to preclude defendant's expert witness from testifying is DENIED. Plaintiff's request that the Court strike defendant's pleadings and permit plaintiff to proceed with a motion for summary disposition is also DENIED. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim or closes this case.

IT IS SO ORDERED.


DONALD G. MILLER
Circuit Court Judge

Dated: May 12, 2006

cc: Lawrence J. Buckfire/Robert J. Lantzy, Attys for Pltf
Boyd E. Chapin, Jr., Atty for Defts

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Carmella S. Satchell
Clerk
BY  CLERK